

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1326

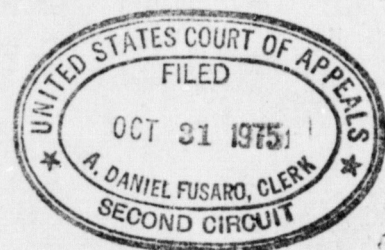
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
GILBERT WARREN JUSTIN,
Defendant-Appellant.

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P/S

BRIEF ON APPEAL

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PRELIMINARY STATEMENT

Appellant, Gilbert Warren Justin, was arrested on April 8, 1975, and charged with a violation of Title 18 U.S.C. Section 545 in the Northern District of New York under Indictment 75-CR-41. The appellant was convicted of the crime charged after a jury verdict and was sentenced on August 1, 1975, to serve three years in a federal penitentiary. A notice of appeal was timely filed.

STATEMENT OF ISSUES

1. Was the stop and search of appellant's vehicle by Agent Coffin illegal? Yes.
2. Did the government establish a prima facie case against the appellant? No.
3. Did the Court err in denying the appellant's motion for judgment of acquittal? Yes.
4. Did the Court err in denying the appellant's motion to arrest the judgment? Yes.
5. Was there sufficient evidence to sustain the conviction of the appellant? No.
6. Were the comments of the U.S. Attorney concerning the credibility of the witnesses prejudicial? Yes.
7. Was the Hon. Lloyd F. MacMahon's instruction on the credibility of witnesses plain error? Yes.

STATEMENT OF FACTS

On or about April 8, 1975, in the early morning hours the appellant was operating a motor vehicle owned by his employer in Canada. The appellant drove the vehicle from Saint Chrysostome where he had been doing business for his employer and himself. The appellant was involved in the business of selling costume jewelry. On that same morning the appellant drove from Canada across the international border to what is commonly referred to as "Covey Hill Road" which travels through Cannons Corners where a Customs Inspection Station is located. This Customs Inspection Station is inland from the border and is only open during daytime hours and closes at about four or five o'clock in the afternoon depending upon whether it is Daylight Saving or Eastern Standard time. The appellant, driving an econo-van truck with Ontario plates and aware that Cannons Corners was not open for inspection and declaration, proceeded down to Route 11 and then turned right on Route 11. At about one-quarter to one-half mile down Route 11 in a westerly direction, Agent Coffin, traveling at a speed of eighty-five miles per hour, came upon the appellant's vehicle traveling in a westerly direction. Agent Coffin testified that he was traveling in this direction because an electronic sensor device was set off when A VEHICLE

of unknown occupancy and/or origin or destination passed over a sensor device located on the Covey Hill Road. Agent Coffin stopped the vehicle and both occupants, Agent Coffin and the appellant, got out of their vehicles and approached one another. The appellant produced identification showing that he was a U.S. citizen and Agent Coffin looked into the rear of the van with the consent of the appellant to determine whether there were aliens in the vehicle. Agent Coffin inspected and determined that there were no aliens in the van.

Agent Coffin then made a check as to where the appellant came from and what his destination was and where he had entered and declared. Simultaneously with this interrogation, Agent Coffin determined that there was a fugitive warrant on the appellant and he called for backup help and the New York State Police. Upon the arrival of the New York State Police, the appellant told Agent Coffin that he wanted the names of all the police officers and he wanted his jewelry that was on the front seat. It was at that time that Agent Coffin and the other law enforcement people conducted a further search.

The appellant was taken to Champlain, New York, and arrested and charged with the crime which he is presently serving a three-year jail term for.

POINT I

THE COURT ERRED IN NOT SUPPRESSING
THE EVIDENCE AFTER A SUPPRESSION
HEARING.

A review of the record will show that prior to Agent Coffin coming upon the appellant, he had no knowledge of any sort that would connect the appellant with the vehicle that activated the electronic sensor device that caused Agent Coffin to travel in a westerly direction on Route 11. Agent Coffin did not see the appellant turn off the Covey Hill Road on Route 11 nor was he able to determine the origin of the vehicle. Agent Coffin testified and admitted that there were several roads leading off Cannons Corners and Agent Coffin testified that the main reason for stopping this vehicle was that it was traveling west on Route 11 opposed to east toward the Port of Entry. Almedia-Sanchez v. U.S. 418 U.S. 266 is the case which decided that the roving patrols and warrantless automobile searches by border patrol agents acting without probable cause contravene the Fourth Amendment rights of the U.S. Constitution and any warrantless search without probable cause is invalid. In U.S. v. Peltier 94 S.C. 2313 Justice Rehnquist reaffirms the "Almedia-Sanchez" doctrine but does not give the doctrine retroactive effect.

In the instant case the "founded suspicion" or "articulable facts" were non-existent in the mind of Agent Coffin as he traveled down Route 11 toward the intersection

of Covey Hill Road and Route 11. None of these facts were present in Agent Coffin's mind when he came upon the econo-van truck traveling west on Route 11. Agent Coffin picked the first vehicle that he came in contact with to stop. His approach was totally without probable cause in any fashion or manner.

In U.S. v. Barbera 514 Fed. 2d 294 the Second Circuit suppressed the evidence obtained from defendant Barbera at the Malone bus station because of the Almedia-Sanchez decision and that the bus stop was not the functional equivalent of the border and that the search was not a border search, and therefore, a search without probable cause which was invalid. In the instant case the argument that Route 11 is the functional equivalent of the border or a checkpoint is erroneous. If the Court determines that where the appellant was stopped is a functional equivalent of the border, it must declare that the land from Mooers, New York, to Chateaugay, New York, down through Route 11 and back to Mooers is the functional equivalent of the U.S. border and that any car traveling within that fifteen to twenty-five mile zone is subject to a warrantless border search. In the event the Court disregards this argument as unreasonable, using the logic of Agent Coffin and his own suspicions, a vehicle that turns left on Route 11 is subject to a border search and any vehicle that turns right requires a probable cause search. Either of these arguments stretches

the Judicial imagination in determining what is a functional equivalent to the border.

The time of the morning and the proximity to the border do not create probable cause but may create suspicion. and a search on suspicion is clearly illegal. U.S. v. Storm 480 Fed. 2d 701. The use of electronic sensor devices has been determined to be adequate as a basis for stopping vehicles. U.S. v. Mora-Shanez 496 Fed. 2d 1181. In that case the Ninth Circuit determined the sufficiency of the sensor notification with the additional facts that surrounded the individual case and, specifically, the fact that the defendants were 660 feet from the border crossing. It would appear from that decision that the sensory devise alone is not a sufficient factual basis to support a probable cause conclusion on the part of a Border Patrol Agent. There must exist other important facts to connect the defendant with a recent crossing of the border and the likelihood of his importing aliens. It appears that probable cause requires more than just suspicion. U.S. v. Brignoni 499 Fed. 2d 1109, U.S. v. Bowen 500 Fed. 2d 960, U.S. v. Diemler 498 Fed. 2d 1070, U.S. v. Nunez-Villalobos 500 Fed. 2d 1023.

Assume for argument's sake that the Court feels that this was a valid border search to determine whether there were aliens present, and if the Court believes that the stopping was justified, it cannot believe that the conducting of a general search for law violations is valid. Plazola v. U.S. 291 Fed. 2d 56, Contreras v. U.S. 291 Fed. 2d 63,

U.S. v. Roa-Rodriguez 410 Fed. 2d 1206, U.S. v. Anderson 468 Fed. 2d 1280, U.S. v. McCormick 468 Fed. 2d 68. In the instant case as soon as Agent Coffin had assured himself that there were no aliens, his right to search ceased and anything he dicsovered on the general search was in violation of the defendlant's constitutional rights.

In the event that the Court finds that the search was illegal, the appellant requests that the fruits of the illegal search be suppressed. Henry v. U.S. 361 U.S. 98 and Wong Sun v. U.S. 371 U.S. 471

POINT II

THE COURT ERRED IN NOT DISMISSING
THIS MATTER AT THE CLOSE OF THE
PROSECUTION'S CASE AND AT THE CLOSE
OF THE TRIAL.

18 U.S.C. 545 contains the essential elements necessary for the conviction of a defendant beyond a reasonable doubt. This section sets forth what is required to prove the crime of smuggling. In this case Title 19 U.S.C. Section 1459 and 1461 must be read together with 18 U.S.C. 545. The facts in the instant case are quite simple. The Port of Entry at Cannons Corner was closed and the law requires that when entering the United States from a contiguous country, a report of such entry and declaration must be met at the nearest Port of Entry from where you crossed the U.S. border. The facts show that the items

were items which required invoicing and that there was a duty due on the goods. The only area of contention is the alleged statement by the defendant that he had reported and declared the merchandise at Mooers and the existence of a map with some pencil marks on it.

A motion for a directed verdict or judgment of acquittal must be granted when a review of the evidence in a more favorable light to the government is such that a reasonable juror must have reasonable doubt as to the existence of any of the essential elements of the crime. The test of sufficiency has been stated numerous times and does not require further elaboration. U.S. v. Harris 435 Fed. 2d 74, Johnson v. U.S. 426 Fed. 2d 651, U.S. v. Bethea 442 Fed. 2d 790, U.S. v. Melillo 275 Fed. Supp. 314 and Bailey v. U.S. 416 Fed. 2d 1110.

In U.S. v. Kurfess 426 Fed. 2d 1017, U.S. v. McGee 220 Fed. 2d 266, U.S. v. Boggus 411 Fed. 2d 110, Thomas v. U.S. 314 Fed. 2d 936 and Current v. U.S. 287 Fed. 2d 268, based upon the facts the evidence was sufficient to sustain the conviction/and a review of the facts would clearly show why there was sufficient evidence to sustain the convictions. In those cases the deception or the opportunity for deception and falsehood were clear and the failure of reporting was plain. These cases assist the appellant in supporting his contention that the evidence was insufficient to convict him.

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It appears that the law as it exists in the United States takes two positions concerning the defendant's duty under the law to declare his goods. The appellant fits in neither. Keck v. U.S. 172 U.S. 466 is clearly a case which stands for the proposition that you cannot smuggle goods into the country until you have crossed the Customs lines. This case has been used to support the incompleting smuggling or the possession of goods on vessels and vehicles where the entry and declaration has not been completed. In U.S.v. Ritterman 373 U.S. 261 Justice Holmes had no difficulty in making this decision because it was obvious that Ritterman had been caught with the goods and repented while in the process of a Customs investigation at the Customs lines. In the instant case, the appellant never had an opportunity to violate the Customs Laws and to commit the smuggling. There is a vast difference between smuggling and the mere importing of goods without the intention of violating the Customs Laws. Babb v. U.S. 218 Fed. 2d 538. In reviewing the prosecution's case in its most favorable light to the government, there was insufficient evidence to permit the matter to go to the jury. Agent Coffin made it clear that the appellant's obligation was to report to the nearest Port of Entry. He at no time testified as to which was the nearest Port of Entry, but rather testified as to the directions that the signs pointed to. In order to sustain a conviction, the circumstantial evidence must be of such a

nature that it is consistent with the hypothesis that the accused is guilty and at the same time inconsistent with the hypothesis of his innocence. In reviewing the facts of this case there is insufficient evidence to sustain this conviction and the Court should have directed a judgment of acquittal of the appellant.

Rogers v. U.S. 180 Fed. 54 is the closest case to the facts that exist in the instant case and in that case it was held that defendant Rogers had ignored three calls of the Customs officer and progressed some distance. The justification of the conviction was that the person did not take advantage of his first opportunity to make a Customs declaration and pay his duty. The Court in that decision analyzes and compares the cases which support the appellant's contention that he did bring goods in but never was given an opportunity to declare them and that his first opportunity was to declare them at Chateaugay, New York, which he believed to be the nearest Port of Entry.

POINT III

THE COURT ERRED IN NOT GRANTING THE MOTION TO ARREST THE JUDGMENT.

Title 19 U.S.C. Section 1459 and 19 U.S.C. 1461 are essential provisions which require affirmative proof by the U.S. Government. The appellant's counsel made a motion to set aside the verdict because there was no proof as to

which Port of Entry, Chateaugay or Mooers, was closest to the point of entry into the United States. Agent Coffin did not establish the distances. The Court erred in thinking that there had been an establishment of the distance and the U.S. Attorney was wrong.

POINT IV

THE U.S. ATTORNEY'S SUMMATION AS TO
CREDIBILITY AND INTEGRITY OF THE
WITNESSES WAS PREJUDICIAL.

The appellant's counsel on several occasions objected to statements by the Assistant U.S. Attorney. The entire case against the appellant was circumstantial. It appears that if you remove a map and an alleged statement by the defendant, the U.S. Government would be unable to prove any clandestine introduction of goods into the country. The constant reference to the credibility between the government witnesses and the appellant with the characterization was highly prejudicial. The U. S. Attorney attempted to bolster the credibility of the government's witnesses. U.S. v. Martinez 487 Fed. 2d 973 and U.S. v. Ludwig 508 Fed. 2d 140.

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POINT V

THE COURT'S INSTRUCTION ON CREDIBILITY
WAS PLAIN ERROR.

Aware of the facts in this case and that the entire case was circumstantial as far as the intent to defraud the U.S. Government, the Court's instruction on credibility was so lengthy and constant as to imply that the issue in this case was not the appellant's guilt beyond a reasonable doubt of each and every element of the crime, but rather a contest of who was telling the truth, the government law enforcement agent or the appellant.

Appellant's counsel did not raise the objection when the instructions were given but the error is of such a nature that the charge as to the credibility is one similar to U.S. v. Blue 430 Fed. 2d 1286. It is clear that that was plain error or a default affecting a substantial right to a fair trial. Federal Rules of Criminal Procedure 52 (b) Dichner v. U.S. 348 Fed. 2d 167, U.S. v. Foster 469 Fed. 2d a.

CONCLUSION

The appellant contends that the Court must do one of the following:

1. As to the first point, the Court must suppress the evidence and direct that the indictment be dismissed against the defendant; or
2. As to Points II and III, the Court must reverse the conviction and dismiss the indictment; or
3. As to Points IV and V, the Court must reverse the conviction and remand this matter for a new trial; and grant such other relief as the Court deems just and proper.

Dated: October 22, 1975

Respectfully submitted,

LIVINGSTON L. HATCH,
Attorney for Defendant-Appellant
Village Offices & Civic Center
Keeseville, New York 12944

THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

TO THE SECRETARY OF THE INTERIOR
FROM THE COMMISSIONER OF THE GENERAL LAND OFFICE
SUBJECT: [Illegible text]

[Illegible text]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JUS BLUMBERG, INC., LAW BLANK PUBLISHERS
EXCHANGE PL. AT BROADWAY, N.Y.C. 10004

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-against-

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AFFIRMATION OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF Clinton

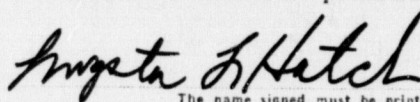
ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for

Gilbert W. Justin

That on October 25 19 75 deponent served the annexed
Record and Brief on Appeal Attn: Wm. J. Dreyer
on Hon. James Sullivan, esq U.S. Post Office Bldg. Albany, N. Y.
attorney(s) for Government
in this action at same as above
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.
Dated Oct 25, 1975



The name signed must be printed beneath

Lvingston L. Hatch, Esq

Attorney at Law

UNITED STATES COURT OF APPEALS
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JOSE BLUMBERG, INC., LAW BLANK PUBLISHERS
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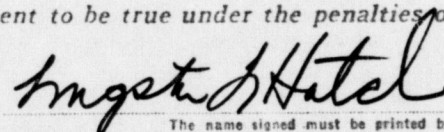
Record and Brief on Appeal

on Gilbert W. Justin., Federal Penitentiary, Lewisburg, PA
attorney(s) for Government
in this action at same as above

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
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Lvinston L.Hatch, Esq

Attorney at Law